(2)

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-393

In the Supreme Court of the United States

October Term, 1985

THE STATE OF OHIO,
Petitioner,

v.

DANNY ALLEN COUNTS,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JAMES R. KINGSLEY (COUNSEL OF RECORD)
SPECIAL PROSECUTING ATTORNEY FOR
PICKAWAY COUNTY, OHIO
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

Attorney for Petitioner

TABLE OF CONTENTS

PAGE

REPLY TO ARGUMENT IN OPPOSITION NO. 1 1

THE COURT OF APPEALS FOR PICKAWAY COUNTY DID NOT BASE ITS DECISION ON AN ADEQUATE, INDEPENDENT, SUBSTANTIVE STATE GROUND SO AS TO PRECLUDE REVIEW BY THIS COURT.

REPLY TO ARGUMENT IN OPPOSITION NO. 2 3

PETITIONER DID PRESENT TO THE SUPREME COURT OF OHIO THE FEDERAL CONFRONTATION ISSUE AS WELL AS THE HARMLESS ERROR ISSUE.

CONCLUSION 4

APPENDIX

Excerpt from Memorandum of Appellant (State of Ohio) in Support of Jurisdiction of the Supreme Court of Ohio

Cover Page A1

Table of Contents..... A2

TABLE OF AUTHORITIES

PAGE

California v. Beheler 3
US 77 L.Ed. 2d 1275, 103
S. Ct. (1983)

Florida v. Meyers 3
US 80 L. Ed. 2d 381 (104)
S. Ct. (1984)

Michigan v. Long 2
US 77 L. Ed. 2d 1201 103
S. Ct. (1983)

Oregon v. Kennedy 2
456 US 667, 72 L. Ed. 2d 416,
102 S. Ct. 2083 (1982)

I

THE COURT OF APPEALS FOR PICKAWAY COUNTY DID NOT BASE ITS DECISION ON AN ADEQUATE, INDEPENDENT, SUBSTANTIVE STATE GROUND SO AS TO PRECLUDE REVIEW BY THIS COURT.

The Fourth District Court of Appeals stated intitially:

> Counts and Adkins were tried separately. In Counts' trial, the Pickaway County Sheriff testified over objection to the contents of a statement made by Adkins, implicating appellant as the principal in both the kidnapping and murder of the clerk. (Tr. Pg. 210-214). The statement was, of course, hearsay. Adkins was not called as a witness and had no showing of his unavailability to testify was made, as required by Evid. R. 804(A). On this basis alone, the statement should have been excluded. See Petitioner's Appendix at pg. A5.

It must be noted that the court did not clearly state <u>why</u> it felt Evid. R. 804(A) had been violated, except later on in the opinion, the court cites the case of <u>Ohio v. Roberts</u>, (1980) 448 US 56 and <u>Barber v. Page</u>, (1968) 390 US 719, for the proposition that the State of Ohio must make a showing of

necessity when a witness is unavailable before principal testimony can be considered.

The court went on to discuss additional bases for excluding the testimony. The court referred to the right of confrontation under the Sixth Amendment to the United States Constitution. The court discussed whether or not a jailhouse confrontation required the presence of counsel to satisfy confrontation requirements and cited United States Supreme Court decisions.

The finding of the court under State Evid. R. 804(A) was based upon the court's feeling it was compelled to do so as a result of United States Supreme Court cases and, therefore, review by this court is proper. Michigan v. Long, US 77 L. Ed. 2d 1201 103 S. Ct. (1983). The court relied entirely upon United States Supreme Court decisions and this fact would permit review. Oregon v. Kennedy 456 US 667, 72 L. Ed. 2d

416, 102 S. Ct. 2083 (1982). The Court of Appeals devoted four lines to the state ground. It devoted four pages to the federal confrontation issue. A summary conclusion as to the state ground will not preclude review by this court. Florida v. Meyers, US , 80 L. Ed. 2d 381 (104) S. Ct. (1984).

The Fourth District Court of Appeals made no reference to state case law to substantiate its hearsay conclusion. The reference to Evid. Rule 804(A) necessarily incorporates United States Supreme Court decisions. Such an incorporation by reference or by implication entitles this court to review. California v. Beheler, US 77 L. Ed. 2d 1275, 103 S. Ct. (1983).

II

PETITIONER DID PRESENT TO THE SUPREME COURT OF OHIO THE FEDERAL CONFRONTATION ISSUE AS WELL AS THE HARMLESS ERROR ISSUE

The State of Ohio, in its Memorandum

in Support of Jurisdiction to the Supreme Court of Ohio, in Case No. 85-0011 set forth the following propositions of law:

PROPOSITION OF LAW NO. 1:

A third person's extra-judicial statement made in the presence of the defendant is to be treated by the trial court the same way as an extra-judicial statement made by a law enforcement officer in the presence of the defendant.

PROPOSITION OF LAW NO. 3:

Where the appellate court finds ample independent evidence to establish that the defendant is guilty as either the principal offender or an aider and abettor and that the wrongfully admitted evidence only involves who the principal offender is, then under the Chapman standard there is harmless error.

The Table of Contents of the Memorandum in Support of Jurisdiction to the Supreme Court of Ohio is set forth in the Supplemental Appendix contained in the reply at pages A1 through A 4 .

CONCLUSION

This case was reversed because the Court

of Appeals found a violation of the Sixth Amendment right to confrontation and specifically so held. The court found that the error was not harmless under United States Supreme Court decisions. The citation to state law was aside and should not bar review of these important issues.

Respectfully submitted,

James R. Kingsley
Special Prosecuting Attorney
157 West Main Street
Circleville, Ohio 43113
Telephone (614) 477-2546
Attorney for Petitioner

NO. 850011

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE
COURT OF APPEALS FOR THE
FOURTH APPELLATE DISTRICT
(Pickaway County)

STATE OF OHIO :

APPELLANT :

-v- :

DANNY ALLEN COUNTS :

APPELLEE :

MEMORANDUM OF APPELLANT IN SUPPORT OF JURISDICTION OF THE SUPREME COURT OF OHIO

Roger L. Kline
Pickaway County
Prosecutor
P.O. Box 584
Circleville, Ohio 43113
Attorney for Appellant
State of Ohio

Gary R. Dumm
206 South Court Street
Circleville, Ohio 43113
Attorney for Appellee
Danny Allen Counts

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
STATEMENT OF FACTS	3
ARGUMENT	10
PROPOSITION OF LAW NO.1:	10

A third person's extra-judicial statement made in the presence of the defendant is to be treated by the trial court the same way as an extra-judicial statement made by a law enforcement officer in the presence of the defendant.

Authorities Cited in Support of Proposition of Law No. 1:

United States vs. Lemonakis (DC Cir 1973), 485, F2d 941, 948-949	10 of Exhibit A
United States v. Metcalf 430 F2d 1197, 1199 (8th Cir. 1970)	10 of Exhibit A
United States vs. Williams (8th Cir. 1977), 548 F2d 228 232 (footnote 14)	10 of Exhibit A
United States vs. Kenny (9th Cir. 1981), 645 F2d 1323, 1340	10 of Exhibit A
United States vs. Abrahamson (8th Cir. 1978), 568 F2d, 604, 606	10 of Exhibit A
"Rule 801: More Than a Definition" by William E. McDaniels	12 of Exhibit A

	PAGE
Ohio Evidence Manuel Giannelli, Sec. 801.12	15 of Exhibit A
State vs. Swiger 5 OS (2d) 151, 169, 160 (1966)	15 of Exhibit A
State vs. Poole 50 App. (2d) 204 (1976)	15 of Exhibit A
Vecchio vs. State 15 App. 153 (1921)	16 of Exhibit A
PROPOSITION OF LAW NO. 2:	11
An appellate court need not review the propriety of a trial court order granting or denying a motion in limine unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial.	
Authorities Cited in Support of Proposition of Law No. 2:	
State vs. Leslie (1984) 14 Ohio App. 3d 343 (headnote 1)	19 of Exhibit A
PROPOSITION OF LAW NO. 3:	13
Where the appellate court finds ample independent evidence to establish that the defendant is guilty as either the principal offender or an aider and abettor and that the wrongfully admitted evidence only involves who the principal offender is, then under the Chapman standard there is harmless error.	
Authorities Cited in Support of Proposition of Law No. 3:	
Chapman vs. California (1967) 386 U.S. 17	22,23,24,26 of Exhibit A

	PAGE
Harrington vs. California (1969), 395 U.S. 250	24 of Exhibit A
Rule 806, Ohio Rules of Evidence	19 of Exhibit A
THIS APPEAL INVOLVES ISSUES OF PUBLIC OR GREAT GENERAL INTEREST AND/OR IS ONE OF RIGHT	14
CERTIFICATE OF SERVICE	15

APPENDIX

Notice of Appeal to the Supreme Court	16
Assignment of Error filed in the Court of Appeals	18
Reply to Assignment of Error filed in the Court of Appeals	19
Opinion of the Court of Appeals	20-27
Amendment to Opinion	28
Journal Entry of the Court of Appeals	29
Entry Overruling Motion for Reconsideration	30
Rule 801, Ohio Rules of Evidence	31
Rule 801, Federal Rules of Evidence	31
Rule 806, Ohio Rules of Evidence	31
Exhibit A, Memorandum of Appellant in Support of Jurisdiction of the Supreme Court of Ohio (involves co-defendant Willie Eugene Adkins)	32